Where the Underwriters on a Vessel settle as for a Total Loss, the damaged Vessel being abandoned to them, they are entitled to deduct the Amount of the Freight, in the event of the Cargo being delivered, and the Freight paid for, the Freight being held to be an Incident of the abandoned Vessel; but in that case the Owners are entitled to recover from the Underwriters on the Freight, the Freight being held to be lost to the Owners.

TURNER *v.* SCOTTISH MARINE INSURANCE COMPANY, *February* 12, 1851.

AN insurance was effected upon the ship "Laurel," of Greenock, and also upon the freight. On her voyage home from Quebec, the vessel came in contact with an iceberg, and was severely damaged. It was, however, kept afloat, and brought home to Liverpool, when she was abandoned to the insurers on the vessel, and a claim made as for a total loss. The cargo, being timber, escaped without injury; and upon the delivery of it, payment of the freight was made to the owners. In an action by the owners against the insurers, the jury found that the vessel was a total loss, and was properly abandoned by the pursuers. The Court afterwards found that, in settling as for a total loss, the insurers were entitled to place to their credit the amount of freight, as being an incident of the vessel abandoned to them. This judgment was affirmed by the House of Lords.

An action was then brought by the owners against the insurers on the freight for payment of the sum insured by them. The ground of their action was, that, as they had been found liable to account for the freight to the underwriters on the ship, the freight had been totally lost to them through perils falling under and arising during the currency of the policy on the freight. Against the action, the insurers pleaded that no loss of the freight had taken place; that, on the contrary, the freight had been earned and received, and the insurance was thereby at an end; that the freight was received by the owners themselves; and if it were afterwards paid over to the underwriters on the ship, that was in consequence of the act of the pursuers in abandoning their vessel, or of the separate contract of insurance on the ship. The Court found that the pursuers were entitled to recover the freight, in respect that the vessel was a total loss.

Lord Justice Clerk Hope observed—"Total loss may occur

though the vessel is brought to port, the cargo delivered, and freight therefore in one sense earned. It is settled law that the total loss of a vessel gives to the underwriters on the ship the right to the freight. I call it freight; for it is really freight, and not salvage. The vessel, though a total loss, has been brought to port—has held together so far as to bring the cargo to port; and therefore, though a wreck, freight is due. But being a total loss to the assured, they must, on claiming on their policy on the ship, 'give up the vessel, and all its benefits and earnings,' to the underwriters paying the value of the ship. In such a case of total loss, the freight is lost to the owners, by and in respect of the perils of the sea causing total loss, just as completely and as necessarily as if the vessel foundered in the course of her voyage. The insurance on freight is against loss from perils of the sea; and wherever there is a total loss, the freight must be paid by the underwriters on the freight. There is an entire fallacy in the argument that freight was earned in this case. When there is a total loss, the vessel is a wreck. She has not, as the ship on which the policy runs, carried freight in the correct sense of the term. She has been lost, and though the cargo has been delivered safe, and so its carriage must be paid for, yet the ship is gone. The ship has not got the freight; but the underwriters are enabled, out of the wreck, to save the cargo. The policy for freight is on the ship as the property of the assured. It is the ship which is insured against perils of the sea to the extent of the freight; and if the ship be a wreck and a total loss, and the freight thereby lost, then the underwriters on freight must indemnify that loss to the assured."

Lord Moncrieff dissented, and observed that he did not think that the claim of the owners for the freight could be sustained on solid grounds of law.

Lord Cockburn observed—"I am of opinion that the pursuers are entitled to decree. It is fixed by the verdict that the vessel was a total loss. Now, the instant that the vessel was totally and actually lost, the freight was lost to the owners. They could not claim freight on account of a voyage not performed, and the voyage ceased the moment that the ship perished. Suppose that the ship and cargo had gone to the bottom, and remained there, there could in this event be no doubt that the owners of the vessel could not have compelled the owners of the cargo to pay the freight, but that they would have been entitled to make up for this loss by recourse against the underwriters on the freight. But what took

place here was this:—The ship being actually and totally lost, the law abandoned it to the ship's underwriters; and the effect of this was, that the planks which had formerly composed the ship accrued to these underwriters, with all that these planks might fetch. And what they fetched was, that the cargo, being wood, a floating article, was brought to the port of delivery, and in these planks. The cargo being thus saved, though not in the way or in the ship contemplated, the freighters were obliged to take it, and to pay what they engaged to give for its transport. But it was to the underwriters on the ship that they paid it. The whole plausibility of the defenders' argument arises out of the accident that the cargo happened to be brought home in the still coherent fragments of the old lost ship. This gives what was paid a freighty sort of appearance. But suppose that the vessel had been irrecoverably sunk or burned, and that the cargo, being heavier than water, had reached the bottom, and had lain there, the freight, as such, would certainly have been lost, and the underwriters on the freight would certainly have been liable for it. Would these results have been avoided if the underwriters on the ship had raised the cargo by the diving-bell, and brought it home in a different vessel? And where is the hardship on the underwriter on the ship being made to pay the sum insured on the freight? Did he not engage for his premium to secure the freight to the owner of the vessel? And has he done this? Certainly not. The underwriter on the lost vessel has, in bringing home the cargo and receiving the freight, done nothing but what he was entitled to do; and neither has the party who paid the freight. All the parties concerned have fulfilled their obligations, except the defenders, who wish to escape from the liability they undertook by taking advantage of the very casualty against which they agreed to protect the pursuers."